No. 84.

IN THE

SUPREME COURT

OF THE

United States.

October Term, 1902.

JOSEPH H. BEALS,
Plaintiff in Error,

v.

JAMES J. CONE AND LYMAN ROBISON,
Defendants in Error.

Petition to the Honorable the Supreme Court of the United States.

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Attorney for Petitioner.

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PETITION.

To the Honorable the Supreme Court of the United States:

Your petitioner, irrespective of the rules of this court, but by virtue of the constitutional right of petition, respectfully represents and shows to the court that he was plaintiff in error in the above

entitled cause; that a writ of error was allowed therein; that the cause was submitted upon both oral and printed argument, and that, after an adverse decision, he filed a petition for a rehearing, which was denied, without any further opinion being given.

Your petitioner further represents that the opinion of the court, denying jurisdiction, is wholly insufficient to constitute an adequate disposition of the questions raised by the record; that it does not fairly meet or determine any of the principal contentions of your petitioner, and that it contains general conclusions of fact that are not correct expositions of the record.

Your petitioner further represents that the court, in its said opinion, states:

"And in the opinion of the Supreme Court, outside of the matters of estoppel and *res adjudicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the constitution or laws of the United States."

Again the court says:

"We fail to see that any title, right, privilege or immunity of a Federal nature was specially set up and claimed. Very likely the construction and effect of Federal statutes were, in a general way, discussed and considered, but nowhere do we find that special setting up or claiming of a Federal right which justifies us in taking jurisdiction."

The present doctrine of this court is that if the highest court of a State actually decides a question that is inherently Federal, adversely to

the contention of a party litigant, then this court has jurisdiction. The actual decision of the Federal question dispenses with the necessity for the record to show the actual setting up and claiming of a right, title, etc., under the Act of Congress. It is conclusively presumed, in such a case, that, in some form, the right, title, etc., was specially claimed, for, otherwise, the question would not have been actually determined. (Equitable Life Assurance Society v. Brown, decided December 1, 1902; Home for Incurables v. City of New York, decided December 1, 1902; Missouri, Kansas & Texas Railway Co. v. Elliott, 184 U. S., 530; F. C. Oxley Stave Co. v. County of Butler, 166 U. S., 648; Mutual Life Insurance Co. v. McGrew, decided February 23, 1903; San Jose Land & Water Co. v. San Jose Ranch Co., decided March 2, 1903.)

Your petitioner further represents that, in his opinion, he has been unjustly deprived of all benefit of these principles, and the above mentioned decisions of this court, and has thereby suffered a great wrong, to redress which he is entitled, under the Constitution of the United States, to present this, his petition.

Your petitioner begs leave to enumerate and state some of the Federal questions expressly determined adversely to himself, by the State Supreme Court, *to which this court has made no allusion.*

1. He offered in evidence two decisions of the Secretary of the Interior holding that, on October 11, 1893, the defendants in error had made no discovery of mineral. Together with these decisions he offered records showing that he was treated as

a party in interest by being summoned before the local land officers and required to establish the allegations of his protest, and by being accorded the right of appeal. All of these records were excluded by the trial court, and these rulings were expressly affirmed by the Supreme Court of the State. Your petitioner's counsel, in oral and printed argument, and in a petition for a rehearing, has maintained that, by these proceedings, a Federal question was raised, a right was claimed under Federal law, and that right expressly denied by the highest court of a State. *This entire question has been suppressed.* It has not been alluded to. We must suppose it has been overlooked.

2. The court below actually decided that a locator must rely solely on his discovery shaft for his mineral bearing vein, and could take no benefit from admitted discoveries outside of such shaft, but within the limits of his claim. The opinion of the state court, on its face, shows that your petitioner was asserting a right, title, etc., under Acts of Congress, and that the same were denied.

3. We contended and showed that the defendants in error had not performed annual labor for 1897—the year preceding the trial, verdict and judgment in this cause, and that, therefore, we had a right, under the Act of Congress, to have a verdict, at least, to the effect that they had not complied with the law. The court below denied our contention and held that they were not required, by the Act of Congress, to perform annual labor at all, after location, as there had been no relocation of the claim.

4. We claimed that, under an Act of Congress, each party was required to prove his own case, and, failing in this, a verdict must be rendered against him. The court below denied this contention, and decided that the burden of proof was on us to show that defendants in error had not done their work for 1897.

Your petitioner further represents that in his petition for a rehearing he fully set forth those portions of the decisions of the court below in which these Federal questions were determined adversely to him. They cover the four questions above noted. Not one of these questions is alluded to by this court. The opinion of this court is as incomprehensible as a *general verdict of a jury*. It does not specifically determine anything in regard to any one of the above noted questions.

Your petitioner desires to challenge the correctness of the opinion of this court, *in point of fact*, wherein it states that "*there is nothing to even suggest that it was requested to consider any question of right, title, privilege or immunity under the constitution or laws of the United States.*" We do not see how this court could quote those portions of the opinion of the court below which were quoted in our petition for a rehearing, and which we again set forth, and then make *any such assertion*. If the court will make these quotations, or state their substance, and then *assume the responsibility of deciding that no Federal question has actually been passed upon by the court below adversely to a right arising upon Federal law*, your petitioner will be perfectly content; and this, he respectfully repre-

sents and submits, he is legally entitled to have done. Until then the case, as presented by the record, and submitted to the court, has not been decided.

In discussing the opinion of this court, as certified to us, we disclaim raising any question as to the motive of the court or any member of it. We only consider its effect. In effect it is a blow in the dark. In effect it is like assassination. We receive the blow, but we don't understand it, or the reason of it.

The only questions decided related to estoppel (which we did not much rely on) and *res adjudicata*. In determining this latter question the court confined itself to the plea, *which was not as broad as the facts*, and ignored all the balance of the record. Beyond this the court did not go, except by what can, as we have said, only be likened to a general verdict.

The court intimates that your petitioner brought this cause to this court under the supposition that there was a general writ of error from this court to the Supreme Court of the State. The correctness of this suggestion is disproved by the fact that your petitioner devoted an entire chapter of his original printed argument to showing how the Federal questions arose, and how they were brought within the terms of the Act of Congress which gives the *special and limited jurisdiction to this court*.

Your petitioner, at great expense, brought this cause to this court, in reliance upon the former decisions of the court to the effect that where the

highest court of a state "*decides a Federal question which it assumes is distinctly presented to it in some way*, this court has jurisdiction. (Home for Incurables v. New York, 187 U. S., 155; Swennigen v. St. Louis, 185 U. S., 46; Mutual Life Insurance Co. v. McGrew, decided February 23, 1903.) We have asserted that the Supreme Court has assumed that certain Federal questions were presented, and has proceeded to decide them, and we have quoted the particular part of the decisions of the lower court in which we contend such Federal questions were decided. How has this court met these contentions? *By a sort of general denial only*. It has not stated the facts, as shown by the record, in regard to any one of these questions. No one, from reading the opinion of the court, can form any idea of the theory, or record facts, upon which we presented the case to this court. Any one reading such opinion would conclude that the counsel of your petitioner had made an egregious Ass of himself by bringing the cause here upon the supposition that a general writ of error would lie to the State court in all cases.

Under the law, as now established by this court, it is not sufficient to say that we did not specially set up and claim title, right, privilege and immunity under the laws of the United States. As to every one of these four questions we did, in the trial court, and in the Supreme Court, specially raise the questions referred to. We did this according to the ordinary modes of procedure, to wit, by offering evidence, by asking instructions, by objecting to instructions, by excepting to the

giving and refusing of instructions, by motion for a new trial, by assignments of errors, etc. The most that can be said is that we did not, at these stages of the cause, specially predicate a claim upon the laws of the United States. This is not strange. No practitioner, at any such stage of a cause, sets forth the particular law on which he makes an offer of evidence, or asks an instruction or assigns error. He does all of these things on the whole law of the case. But every one of these questions rested naturally, nesessarily and inherently on the laws of the United States. The rights asserted, in each and every instance, depended solely on Acts of Congress; but it is only when we come to discussing the law of the case that such Acts of Congress are specially brought forward. The opinions of the court below show, on their face, that we relied upon, and claimed right, title, privilege and immunity under these Acts of Congress. In some instances the court below *specially states our claim;* and, in all of them, this court can readily see, in view of the manner in which the questions were raised, and in view of the way in which they were treated by the court below, that we were specially claiming under the laws of the United States. But, according to the modern doctrine of this court there need be no hair-splitting upon the subject as to *how or with what particularity we set up and claimed our rights under the laws of the United States.* That the court below did expressly deny right, title, privilege and immunity, *depending solely upon the laws of the United States,* as to every one of the questions herein noted, the

most casual reading of the opinions of that court *will demonstrate*. And still more than this—those opinions show, on their face, that the court knew that it was considering questions that arose solely upon the laws of the United States. But all of this is wholly immaterial if the court below, as a matter of fact, did actually decide Federal questions, which decisions operated to deny any right, title, privilege or immunity to which plaintiff in error is entitled under the laws of the United States. He had and has a right, title, privilege and immunity, by virtue of the laws of the United States creating the Department of the Interior, and by virtue of the decisions of that department, to have the question of fact as to whether a mineral vein had been discovered in the Ophir shaft prior to October 11, 1893, treated as an adjudicated fact. This was denied. He had and has, under an Act of Congress, a right and title to the Tecumseh lode based upon the fact that he made two admitted discoveries of mineral veins within the limits of the claim, all consideration of which was wholly excluded by the court below. He had and has the right, under an Act of Congress, to have a verdict rendered against the defendants below on the ground that they did not perform their annual assessment work for the year 1897, and the court below, in expressly construing the Act of Congress, denied this right by holding that such labor need not be performed. He had and has the right to have the defendants below required to make out an affirmitive case, in order to be entitled to a verdict and judgment. This right was denied by

the court below by casting the burden of proof on your petitioner to show that they had not complied with the law. If we are mistaken in believing and asserting that these rights, arising under the laws of the United States, were actually denied by the court below, then it will be an easy matter for this court to state the record facts as to what the court below did decide as to each of these questions, and show, specifically how and why it is that no Federal question was actually determined. If the court shall ascertain, as we believe and submit, that it will, that Federal questions were actually determined, and rights, arising upon laws of the United States, actually denied, then we pray the court to specifically adjudicate as to why the principle, determined by nearly a dozen decisions of this court, to the effect that where the court below *assumes that a Federal question is raised in some form, and proceeds to actually determine the same*, the jurisdiction of this court attaches does not apply to this cause. Is this unreasonable? Are we asking too much? Are we asking anything more than that the court shall *fairly state and decide the case?*

For the convenience of the court we again set forth those portions of the decisions of the court below, which we have maintained, and still maintain, constitute actual determinations of Federal questions. They are as follows:

"Numerous errors are assigned on the rulings of the trial court with respect to the admissibility of evidence, some of which are new and important. On the trial, appellant offered in evidence the de-

cisions of the Department of the Interior rendered in the matter of the protest against the former application of appellees for patent on the Ophir lode, together with a notice directed to them, that a hearing had been ordered upon such protest. Each of these was excluded. These decisions were rendered in the proceedings mentioned in the plea of *res judicata*, to which reference has already been made. The principal contention between the parties was, upon which of the conflicting lode claims was a discovery of mineral first made? The department, in the protest proceedings, found from the evidence submitted, that no discovery of mineral had been made upon the Ophir on the 11th day of October, 1893. Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date. A sufficient answer to this proposition should be that as the judgment rendered in the protest proceedings was not *res judicata* between the parties to this action, that no fact found by the department in those proceedings would be competent to contradict or establish any fact directly in issue in this. A consideration of the nature of an application for patent to mineral lands which is rejected, and the result of the judgment of the Department of the Interior, which merely holds that the applicant is not entitled to patent, and where the rights of others to the lands embraced in the application are not determined, will demonstrate that no finding of fact made by the department in such case is either conclusive or admissible in evidence in another action in which the appellant bases no rights to the ground in controversy by virtue of such proceedings. Under the law regulating the issuance of patents to mineral lands, and the rules of the department, certain facts must be established. If not, the application is dismissed. Such a judgment is, in effect, one of

nonsuit, and therefore not one upon the merits. *Iles* v. *D. & R. G. Ry. Co., 25 Colo., 19.*

It is no more than a conclusion, that in that particular application the applicant has failed to establish the necessary facts to entitle him to a patent the same as a judgment of nonsuit would be directed in an action at law, where the plaintiff had failed to establish the facts upon which he relied to entitle him to the judgment demanded. The fact that a protest had been filed does not change the rule, when, as in this case, the rights of the protestants were neither involved nor adjudicated. Many authorities are cited by counsel for appellant, in which it has been held that the findings of fact made by the Department of the Interior are conclusive upon the courts. In all these cases the question involved was the authority of the courts to redetermine questions of fact already determined by the department, where parties either based their rights upon a muniment of title issued by the government, which had been annulled, or were attempting to show that the facts upon which a patent had been issued were different from those necessarily established before the department upon which it based its action. This is not the case at bar. Appellees are not asserting any rights to the premises in dispute by virtue of the cancelled receiver's receipt, by attempting to show that the findings of the department, that no discovery of mineral had been made upon the Ophir at the time of their former application, were not justified, but have instituted another proceeding to procure patent, which may be likened to a new action after having suffered judgment of nonsuit; and hence, the authorities cited are not in point.

Our attention has not been directed to any case where the question here involved has been directly decided, but we think the rulings of the Department of the Interior fully sustain our conclusion, that the cancellation of a mineral entry only is not *res judicata* on another application for

patent, and that the facts found, upon which such action is based, are not admissible to support an adverse claim against a second application for the same premises. In *Branagan* v. *Dulaney*, 2 L. D., 744, Secretary Teller, in speaking of the rights of the locator of a mining claim, says:

'The government gives the possessor of a lode his choice, to hold it without patent or to take a patent. If he attempts to take a patent, and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he chooses so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith.'

In the case of the *Clipper Mining Company*, reported in 22 L. D., 527, it appears that certain parties applied for a patent on a placer claim, against which a protest was filed, upon the theory that the land embraced in the application was not a placer. This protest was sustained, the department finding, as a matter of fact, that the ground was not subject to location as a placer mining claim. Afterwards, lode claims were located within the limits of the placer, upon which applications for patent were made. The owners of the placer filed an adverse claim against the issuance of patent to the lode claims, in which they set up their old placer title; the applicants moved to dismiss, because a judgment had already been rendered by the land department, that the ground claimed as a placer could not be held as such, and the department refused to dismiss the adverse of the placer claimants, which was affirmed by the Secretary of the Interior. While the judgment of the latter seems to have been based largely upon the proposition that the adverse claim ousted the department of jurisdiction, the Secretary, in his opinion, said:

'It is contended by counsel for applicant that the judgment in the Searl placer was a complete and final adjudication; that the land embraced therein was not placer ground, and could not be entered as such; hence, the adverse claim filed by Searl, *et al.*, based, as it is, upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issued, notwithstanding. * * * The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent; the department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.'

In the case of *McGowan, et al.* v. *The Alps Cons. M. Co.*, 23 L. D., 113, the Secretary of the Interior, in speaking of the effect of the cancellation of a mineral entry, said:

'The fact that the entry was cancelled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right, so long as there was a compliance with the requirements of the law.'

The fair inference from these rulings is, that the judgment of the department, rejecting an application for patent and nothing more, leaves the applicants with the same rights as though no application had ever been made. * * *

Counsel for appellant contend that under instructions given and refused, the jury was precluded from considering the admitted fact, that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral bearing vein was disclosed in the discovery shaft

upon which the present location of the Tecumseh is based was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is, that if a well defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim, which disclose the mineral necessary to constitute technical veins.

No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there may be no mistake as to the position of counsel on this subject, we quote from their original brief as follows:

* * * 'If the discovery shaft contains a well defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his discovery of the mineral necessary to constitute technical veins. The State statute does not provide what the well defined crevice shall contain, while the Act of Congress makes no provision as to what shaft the vein required shall be in. Reading and applying the two statutes together, we submit that the well defined crevice must be in the discovery shaft, and the mineral bearing vein may be found in some other shaft upon the claim.'

And also from their reply brief, in support of their petition for a rehearing, the following:

'We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well defined crevice (as required by the State statute) and the discovery of a vein (as required by the Act of Congress) is *wholly dependent* upon the discovery shaft. * * *

'We have not questoned the validity of our State statute. It is not necessarily, when properly construed, in conflict with the Act of Congress. Both the State statute and the Act of Congress can be given effect, and they should be so construed as to accomplish this. * * *

'We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that when the State statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the Act of Congress.'

The statute of this State, which designates what shall be disclosed in the discovery shaft, provides that it shall disclose a well defined crevice at the depth of at least ten feet from the lowest part of the rim of such shaft at the surface. Sec. 3152, Mills' Ann. Stats. It being conceded that the laws of this State relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the State statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim can not supply the absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant can not be upheld, unless the State statute is declared invalid, and the admission upon their part that it is not, relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh.

'Crevice,' as employed in the statute relative to a discovery shaft, clearly means a mineral bearing vein. It was so held by this court in Bryan v. McCaig, 10 Colo., 309. The Circuit Court of the United States for the District of Colorado has adopted the same view. Van Zandt v. Argentine Co., 8 Fed. Rep., 725; Terrible Co. v. Argentine Co., 98 Fed. Rep., 583; Cheesman v. Shreeve, 40 Fed. Rep., 787.

Under these decisions, coupled with the admitted legality of the State statute, the fact that

discoveries were made in shafts 2 and 3, upon which no locations were made, does not in any manner affect the validity of the Tecumseh.

* * * * *

It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work for 1897, a distance of seven or eight feet; that this drift was worth $12 per foot. For this labor appellee appears to have paid the sum of $90. For additional work he paid for two days' work at the rate of $4 per day, and later, for further work, $18. This, in addition to paying for the powder, fuse, steel and candles that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine, and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the court, by instruction No. 24, directed the jury as follows: 'Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff, and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants.'

The objection urged to this instruction is, that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which

appellant can base any claim. The Act of Congress (Sec. 2324, Rev. Stat. U. S.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is, that as between the locator and the genetal government the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a *prima facie* case is made on the part of the original locator by showing a valid location. Hammer v. Garfield M. Co., 130 U. S., 291.

To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. Renshaw v. Switzer, 15 Mining Reporter, 345; 6 Mon., 464; 13 Pac. Rep., 127.

It is the location by the new claimant and not the mere lapse of time which determines the right of the original locator. Little Gunnell G. M. Co. v. Kimber, 1 Morrison's Mining Reports, 536.

So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not in fact performed. Hall v. Kearny, 18 Colo., 505; Johnson v. Young, 18 Colo., 625; Hammer v. Garfield M. Co., *supra*."

Your petitioner respectfully prays the court to again read and analyze the above quotations from the opinions of the court below, and set forth the same or the substance thereof, and show, how and why it is that Federal questions are not actually determined therein, and why the former decisions of this court, to the effect that where questions of this character are actually determined, this court looks no further to see how they are specially set up and claimed. This is asking nothing but that the court actually decides the true case, as shown by the record, and as presented to this court.

I.

Decisions of the Secretary.

Your petitioner offered in evidence two decisions of the Secretary of the Interior, rendered in a cause respecting the same subject matter and between the same parties. As to these decisions the court below said:

"The department, in the protest proceedings, found from the evidence submitted, that no discovery of mineral had been made upon the Ophir on the 11th day of October, 1893. *Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date.*"

Here, then, a Federal question, and our contention in regard thereto, *is clearly stated.* This court has already recognized that pleading a Federal judgment raises a Federal question. It has

proceeded to decide that our plea of *res adjudicata* was insufficient in that it did not show that plaintiff in error was an *interested party*, and entitled to the *rights of a party*, among which is the right not to have to litigate a distinct fact *already once adjudicated by a competent court*.

The decisions, and other records, offered in evidence, together with the pleadings, demonstrated that the protestant in the department was an *interested party;* that he had an *adverse claim;* that he was protesting against the issuance of a patent in order to *protect his adverse claim;* that he was summoned into the department and required to prosecute his protest; that all the *burdens and duties*, of a party litigant were cast upon him by the department, and, finally, *an appeal was accorded him*. All of these facts, *reaching far beyond the allegations of the plea*, made these records conclusive of the issue as to whether a discovery of mineral had been made in the Ophir claim prior to October 11, 1893. There can be no doubt but that the offering in evidence of a Federal decision and judgment (the same as the pleading of a Federal judgment) raises a Federal question. The court below actually decided this Federal question. Your petitioner, therefore, submits that it is the plain, imperative legal duty of this court to review that question, or to give some reason for not doing so.

II.

Place of Discovery.

The court below held that the discovery of a vein which the Act of Congress allowed to be discovered anywhere *within the limits of the claim* must be discovered in the discovery shaft, and not elsewhere. We were asserting title under admitted discoveries in two other shafts. We made this claim under the Act of Congress. The court below, in four different instances, quoted from our briefs, in which quotations we expressly rested our claim of right upon an Act of Congress. The right thus asserted was denied by the court below. Your petitioner prays that this question be expressly passed upon by this court.

Upon this question the court below said:

"*The proposition of counsel for appellant is, that if a well defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim, which disclose the mineral necessary to constitute technical veins.*"

The court followed this statement with four distinct and separate quotations from our briefs showing that we *predicated our contention on the Act of Congress which allows a discovery to be made any where within the limits of our claim.* Here, then, is a distinct and unequivocal special setting up and claiming right, title, privilege and immunity under the laws of the United States. The opinions of the court below are a part of the record. They

show, as we have seen, distinctly upon their face, that we were asserting right, title, privilege and immunity under the laws of the United States, by virtue of having made admitted discoveries in shafts Nos. 2 and 3. This court says that we contested other questions, but this was one of the questions that was thoroughly contested from beginning to end. We made this contest by introducing evidence that we had discovered mineral veins in shafts Nos. 2 and 3 and drawing out an admission of this fact; by asking instructions as to the force and effect of these discoveries, and by objecting and excepting to others; by motion for a new trial and by assignment of error in the court below, and by presenting the question, in briefs and arguments, in which we fully developed our assertion of right, title, privilege and immunity under the laws of the United States. How can this court read the opinions of the court below, and then say that *there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the laws of the United States?*

This question as to the place of discovery is one of vital importance. The whole case may have turned upon it with the jury. If the jury found that our discovery in the discovery shaft was insufficient, and that defendants in error made no discovery until 1895, when they, for the first time, resumed work after 1892, then the disallowance of our discoveries in shafts 2 and 3 operated to change the entire result of the cause. The trial court excluded these discoveries from considera-

tion and this ruling was affirmed by the Supreme Court. It is perfectly plain, so plain that the wayfaring man need not err therein, *that the court below thereby denied a title, right, privilege and immunity specially claimed under the laws of the United States.* Certainly this is a question that *ought not to be passed in silence.* Justice, conscience and truth demand that it shall be expressly adjudicated. The time for filing a petition for rehearing has not expired. Even if this cause has been remitted to the court below, that mandate may be recalled. This has been frequently done by appellate courts. It is not too late for this court to fairly and fully consider and determine this cause.

III.

Annual Labor.

Annual labor is required by Act of Congress. The particular section of the laws of the United States requiring annual labor to be performed each year *until patent has issued*, is referred to and construed. We do not see how it is possible for this court to hold that a Federal question is not actually determined. But if it can, let it do so. We have a plain legal right to an express adjudication upon the question.

IV.

Burden of Proof.

Another Act of Congress provides that where either or both parties to an adverse suit fails to establish title the verdict shall be against him or

them. This casts the burden of proof on each party to prove his own case. This Act of Congress was plainly violated, and a Federal question was actually decided.

Your petitioner respectfully represents that he feels wronged and aggrieved, not so much by the loss of his property rights, as he is by being deprived of them without a full and fair adjudication thereof; that the mine involved in this cause is a valuable one, but the value of this mine, and all the mines of the United States, sinks into insignificance in comparison with the question as to whether a citizen of the United States can be deprived of his property rights, *in this high court*, without a full and fair hearing and adjudication, which comprehends the length and breadth of the record facts of his cause. Your petitioner respectfully inquires why, when he quotes a certain portion of the opinion of the lower court and maintains that this particular language constitutes a decision of a Federal question, and repeats this in regard to several other quotations which he submits, amounts to actual decisions of other Federal questions, this court should refuse to quote a word from such opinion, and make no attempt to state the substance or effect of such opinion, on any one of these questions, and passes all of these contentions by with a mere general statement that the opinion of the lower court did not deal with any Federal question. Does this amount to a decision of the cause as submitted? Is such a procedure in harmony with the practice of this court? If so, then this court might just as well

affirm, reverse or dismiss a cause without saying any word other than the one indicating the final result.

Your petitioner, therefore, respectfully prays the court to set forth those portions of the opinions of the court below which have been quoted herein, or the substance and effect thereof, and explain why they do not constitute actual decisions of the Federal questions herein specified, and, if so, why the adjudications of this court, to the effect that actual decisions of the lower court of Federal questions will be reviewed, irrespective of the particular manner in which they are brought to the attention of the court below.

Respectfully submitted,

H. B. JOHNSON,

Attorney for Petitioner.